No. 192.

Reply Br. of Flickinger & Safford for P. E.

Supreme Court of the United States.

Filed Jan. 17, 1898.

DANIEL DULL and NELLIE M. DULL,
Plaintiffs in Error,

AGAINST

JOHN E. BLACKMAN, EDWARD PHELAN, EDWARD R. DUFFIE and GEORGE F. WRIGHT,
Defendants in Error.

No. 192.

Brief in Reply by Plaintiffs in Error.

In this brief, which is filed in reply to that of Defendants in Error, we have followed the order of argument and subdivisions of that brief.

1. We have not contended that the New York decree was *in rem*; nor was the New York judge who signed the decree misled as to the service on the defendants. It had been expressly ordered by that Court that service should be made by publication or delivery of a copy to the non-resident defendants outside of the jurisdiction, which was done (42–43).

2. The contention that when the New York decree was obtained Dull had no interest in the land by reason of the previous conveyance to his wife proceeds also upon a false assumption of the law governing such cases.

Blackman made this defense in his answer in the New York Court (56–60), and that issue was decided against him.

It was never claimed that the conveyance to his wife was a parting with any substantial interest. The conveyance was made solely for the purpose of giving the world notice on the public land records that he was still asserting title to it (49).

Dull was in equity the owner (Cotton *vs.* Wood, 25 Iowa, 33); the real party in interest, as argued by defendant's counsel, and the proper party to bring the action. The decree of the New York Court must be considered as final as to this subject and it does not lie in the mouth of Blackman, Phelan & Co. now to gainsay it.

Besides, Dull and his wife are both in this case asserting such to be the fact and both assenting to it.

Even if the conveyance had been considered absolute between them, Dull, as warrantor or for the protection of his tenancy interest, had a right to prosecute this action in his own name.

3. The claimed rule in Swann *vs.* Clark, 36 Iowa, is not sustained by the opinion and is not applicable to this case. That cause was dismissed by the appellate court because the plaintiff could not obtain the relief asked for reason that the real party in interest was not before the Court.

If the judgment had not been reversed but sustained, as decided in the District Court, it could not have been considered as a nullity between theparties, particularly if it appeared, as in the case at bar, that the defendant in Court retained the lion's share of the property.

It is said "that at the date of the rendition of the

decree Blackman had previously disposed of all his interest in the subject-matter of the action."

This assumes that the contract of October 6, 1892 (38), was, in equity, such a conveyance, and that Blackman thereby parted with all beneficial interests; that is not so, but what the contract contemplated is best shown by its terms, and the interest still retained by Blackman is discussed in paragraph 3, page 22, of our opening brief.

The claimed rule is not supported by the authority of Massie *vs.* Watts and the other citations in this subdivision; but on the contrary, they sustain the rule which we contend for.

4. It is claimed that the New York case does not come under the exception of fraud, trust or contract, as laid down in Massie *vs.* Watts. The pleadings in the New York case are fully set out in the record (Complaint 43; Amended answer 56–60), and show that fraud and concealment arising from misrepresentation and double-dealing were the bases upon which that case proceeded.

It is claimed that "failure to deliver consideration never invalidated a deed," and Lake *vs.* Gray, 35 Iowa, 459, is cited as sustaining such a rule.

If that case is to be considered as determining the proposition contended for (as may well be doubted), then it may safely be said that the Supreme Court of Iowa has overruled that decision and the learned counsel evidently forgets the case he is arguing here, in which the deed of Blackman to Wright was canceled, upon the pleading that there was failure to deliver the consideration upon which the deed was executed. (See Record, 105).

5. This subdivision again falsely assumes that Blackman had parted with all his interest in the land, and asserts that the New York decree is void and of no more value than so much waste paper even as to Blackman.

This is but a continuation of the untenable claims of counsel. A Court of Equity disregards mere form and looks only to the substance of things.

The pickpocket has usually a confederate near him to whom, for the purpose of escaping detection, he passes the stolen purse that the plunder may be divided at their leisure. As applied to this case, counsel has shown an utter inability to comprehend the relationship existing between the principal and the confederates in the appropriation of plaintiff's land.

6. It is claimed that by reason of a failure to file a petition for rehearing, the judgment of the Supreme Court of Iowa was not final. We admit that by a clerical error, the clerk of the Supreme Court of Iowa omitted from the record (as certified) a statement of the filing of such a motion and the argument and judgment thereon. The fact of this omission from the record in this court did not come to knowledge of counsel until the filing of the brief for the defendants in error. But we assert that such a motion was duly filed, heard and decided, and we rely upon the indulgence of the court, should this matter be considered to be of importance, to give us an opportunity to correct the record in this respect.

In conclusion "privity in estate is where there is a mutual and successive relationship in the same rights to property. * * * Privies are bound because they have succeeded to some estate or interest which was bound in the hands of the former owner."

(Freeman on Judgments, Section 162.)

The voluntary grantee of land without payment of consideration before suit brought and judgment rendered is in privity with his grantor and bound by the judgment subsequently obtained against him.

(Swihart *vs.* Schaun, 24 O. St., 432.)

As shown by paragraphs 1-8, pp. 14-37, of our opening brief, the claimed conveyance to Phelan was *voluntary* within the meaning of this term; that is, without consideration, and with notice which, under the definition and authorities above cited, made him a privy to Blackman and therefore bound by the New York judgment.

In other words, Phelan took the conveyance burdened with the equities of Dull. These have been crystallized into the New York decree, and Phelan being a privy in estate, is powerless to resist their enforcement.

We adhere to the statement made upon page 26 of our original brief that "It is solemnly admitted by Phelan and Duffie *upon the record* that they acquired their interests without any consideration and with full notice of the fraud." This statement is reproduced in a garbled form in defendants' brief, page 19. and the statement is said to be too outrageous to be met with the "gentle language of indignant denial," whatever that may mean. The argument in our brief upon this subject was based upon the admissions of the pleadings, and it is perfectly plain that Phelan and Duffie

were said in the cross-petition of the plaintiffs in error to have acquired their interests without any consideration and with full notice of the fraud. This statement of the pleadings was not traversed, and those facts therefore stand admitted upon the record precisely as we have stated; in fact, it has been continuously insisted by us that one of the errors of the Iowa Courts sprang from their having considered evidence on this point, although it appeared "from the record" that that question was settled by the pleadings.

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A. G. SAFFORD,
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DEFENDANT'S BRIEF

No. 192.

Brief of Strawn for D. & W.

Filed Jan. 13, 1898.

In the Supreme Court of the United States.

October Term, 1897.

Daniel Dull and Nellie M. Dull, Plaintiffs in Error,

vs.

John E. Blackman, Edward Phelan, Edward R. Duffie and George F. Wright, Defendants in Error.

No. 192.

Error to the Supreme Court of the State of Iowa.

WINFIELD S. STRAWN, *for Defendants Phelan, Duffie and Wright.*

BRIEF OF DEFENDANTS IN ERROR, PHELAN, DUFFIE AND WRIGHT.

In the Supreme Court of the United States.

October Term, 1897.

Daniel Dull and Nellie M. Dull,
Plaintiffs in Error,

vs.

John E. Blackman, Edward Phelan, Edward R. Duffie and George F. Wright, Defendants in Error.

No. 192.

Error to the Supreme Court of the State of Iowa.

WINFIELD S. STRAWN, *for Defendants Phelan, Duffie and Wright.*

BRIEF OF DEFENDANTS IN ERROR, PHELAN, DUFFIE AND WRIGHT.

(Mem:—The figures at the corner of a word, refers to the page of the record printed in this court.)

A full statement of the case is printed in my brief on the motion to dismiss or affirm and need not, I suppose, be repeated here. I beg to refer to said statement and have it considered on this hearing.

Much, also, that is applicable to the merits of the case is argued in that brief, to which I beg to refer; and will try to avoid repeating the same herein.

The alleged New York decree was pleaded by Dulls, first in abatement, and next, to use their own words, as "*a complete adjudication* of the rights of the

parties to this controversy and as a bar to the further prosecution of this action." Let us therefore consider the alleged decree in its various aspects.

1. *The decree does not purport to be one in rem; or profess to establish title in Dull.*

Before going into the legal propositions arising upon the offer of said decree as evidence of the extraordinary action of the courts of another state, let us inquire and ascertain just what that court undertook to do in the premises, before determining what effect, if any, its action could have on the *subject matter* of the Iowa suit. Just what was "adjudged and decreed" by that court is found on page 65 of the record; and it is worthy of notice that such decree does not even purport to act on the subject matter of this suit, but only professes to be a personal decree. It directs Blackman to execute to Dull a deed for the premises, but does not in itself assume to pass the title, either absolutely, or in the event that Blackman does not comply with the order of the New York court. It purports to restrain and enjoin Blackman *et al.* from prosecuting their action in the courts of another state; but it does not for an instant assume to settle the title between these contesting parties or any of them. Nor does the decree profess to act on the subject matter of this suit; but does only assume to lay particular commands upon the parties, or supposed parties, to the suit—which commands if obeyed, either voluntary or under process from the court, would have affected the subject matter of the suit, but which, in the absence of such obedience to such commands, leave the said subject matter (the land) wholly unaffected.

The decree is plainly *in personam* and not *in rem*. And herein can be recognized a knowledge of the law, with which the judges of the courts of that great state

must generally be credited; and we doubt not that it is but simple justice to the judge who signed such alleged decree, to say that he did it under the impression, if not with the express understanding, that those *named* as defendants (including the title holder, Phelan, and mortgagee, Duffie), had *all* been personally served within the jurisdiction of his court, and that he might, therefore, properly render a decree *in personam* which he did not offer to render *in rem*. The decree, then, does not purport on its face to have the effect claimed for it by the appellant.

2. *So far as the decree purports to grant Dull any relief, it does so in a case where he had previously disposed of all his interest in the subject matter of the action.*

Another thing about that decree: It purports to grant relief to Dull long after his pleadings in this case, and evidence show he had deeded the land away; and the grantee, the real party in interest, was not substituted, or indeed made any mention of in said suit and decree. Dull brought his suit in New York November 3, 1892.[12] He filed his cross-petition in this cause February 15, 1893,[13] averring that he had conveyed the Iowa lands to Nellie M. Dull, his wife. This conveyance was September 22, 1892. Eight months after such conveyance, and on May 20, 1893, he pretends to take a decree[65] in *his* favor, in New York and claims that such decree settled *in him* the title to land which he no longer owned. How can this be?

By the laws of the State of Iowa an action must, with excepted cases, be in the name of the real party in interest, and this as well in its progress and decision, as when brought. Code of 1897 §. By his own showing he had parted with his ownership three months before the decree, and his grantee was not sub-

stituted as plaintiff or in any wise named or included in the subsequent proceedings, ending in a decree. What he claims was decreed in his favor in that suit, is negatived and annulled, on his own showing, by his voluntary alienation of the alleged interest with which he began the action; and the fact that his grantee was never made a party to the suit in which the alleged decree was rendered. Our laws require the presence in the suit, at every stage of the proceedings, of the real party in interest; and the laws of New York will, in the absence of a showing to the contrary, be presumed to be the same as the laws of Iowa. Dull conveyed this land and any and all the interest he claimed therein, even *prior to the commencement of his suit in New York*. This is shown by his offer in evidence by himself, of his deed to his wife[81] dated September 22, 1892, and *recorded in Iowa* September 26, 1892, while his pretended New York suit was not brought until November 4th following.[81]

It was for Dull to affirmatively establish every fact necessary to entitle him then or now to claim anything by or on account of his cross-petition; and having shown in that affirmative pleading that he had parted with the interest he once claimed in that land, it was incumbent on him to show that such transfer was at a time which did not bar or affect his right to the relief asked. No presumption can be indulged in his favor where he is required to make affirmative proof, and the proof now shows that such transfer to his wife, was made before even the New York suit was instituted. In any event the decree therein was worthless as to him, and it does not pretend to confer rights upon any other party to this suit.

Suppose, too, that after this transfer to his wife, Dull had commenced an action for damages for injuries done the real estate; or if it were city property, was

prosecuting an appeal from an award of damages for a change of grade, or had brought any kind of a suit for any matter grounded in the ownership of the real estate, could such action be for a moment sustained in the face of the proof that the title was in his wife? It would be impossible. *City vs. Northcutt*, 63 N. W. (Neb.) 807. How much more, then, is the rule applicable when what the plaintiff (the non-owner) claims is the *title* itself?

3. *The decree is void as a decree in rem for want of jurisdiction of the New York Court over real estate situated in Iowa.*

But if the decree were different and did import the character claimed for it by appellant, then upon jurisdictional grounds it is null and void so far as the *subject matter* of this suit is concerned.

That the laws of a state alone govern real estate within its boundaries, is elementary. The statute (Code § 2576) provides that an action "for the recovery of real property, or for an estate therein, or for the determination of such right," "*must* be brought in the county in which *the subject of the action*, or some part thereof is situated." This ought to be conclusive so far as the effect of a suit or decree upon *the land*, as land is concerned; in other words, to bind the subject matter of the suit in an action and by a decree which would *act upon the land* independently of any act of any party to the suit to be by them done or performed. Judged by this statutory test, the New York decree is absolutely null and void.

Even where the land lies within the jurisdiction of the court, jurisdiction must also be duly obtained over the person *in whom is the title*, or the decree is a nullity. This is the principle of *Swan vs. Clarke*, 36 Iowa, 560; and is so axiomatic that the Supreme Court of that state declined to enter into any discussion of that case,

but disposed of it in an opinion of twenty-five lines. So that a decree to operate *of itself* upon real estate, must be in a case both where the land lies within the jurisdiction of the court *and* the title-holder of such land is duly brought under its jurisdiction. *Both* of these requisites must unite in one and the same action; and unless *both* do concur in one and the same case, the decree is but so much waste paper—so far as it is intended to affect the land *as land*. Citations of texts and authorities upon this proposition would, we think, be superfluous.

So the decree of the New York court was worthless as evidence of *title*, even if Blackman had still held the title to the land; but when further viewed in the light of the fact that Blackman had, before that suit was instituted, fully parted with all title to the same, and confirmed that conveyance in the most absolute manner,[38] the utter worthlessness of such decree as an instrument of evidence, is fully apparent. And if its utter worthlessness *could* be detracted from, it would be by the other fact that it was rendered in an action by Dull, *after he* had conveyed away the land; if, indeed, that conveyance had not been made prior to the commencement of his action, as it actually was.[81]

The errors of adverse counsel upon the question of jurisdiction are grave, and the inapplicability of the cases cited is easily pointed out. *Massie vs. Watts*, 6 Cranch 148, was a case in which Watts sought to compel Massie to convey to Watts, lands located in Massie's name, but within a location made under a land warrant owned by O'Neal and assigned to Watts, and placed in Massie's hands, as a common locator of lands. Here was a plain trust created by the act of the parties; and the court, in an action wherein it obtained personal jurisdiction over all the parties, made a decree that Massie, in whom the title still rested, should convey to

Watts. This was a decree *in personam*, and did not, of itself, act upon the land, or profess so to do, but did provide for Massie doing an act, *which act when done, i. e.*, the making and delivery of a deed, would transfer title. But the decree did not claim to make that transfer itself. If Massie did not obey the decree, and himself (not the decree) make a deed as ordered, the court could punish him, but the *title* remained where it was when the suit was commenced. Such is the effect and only effect of a decree made by a court not having territorial jurisdiction of the land. The court itself calls attention to the fact well known to the profession, that actions to enforce a trust are "local and transitory at common law" and "follow the person." But where the judgment is of itself to operate directly on the land and settle the right to the *thing* itself, without regard to any future act to be done by any *person*, the court must have jurisdiction over the *rem* as well as the parties owning or having liens on the same.

In the great case of *Penn vs. Lord Baltimore*, 2d Leading Cases in Equity, 1047, Lord Hardwicke distinctly said the court could not enforce a decree *in rem* in such case if they did make it. He further said (page 1061):

"In the case of Lord Anglesey, of land lying in Ireland, I decreed for distinguishing and settling the parts of the estate, though impossible to enforce that decree *in rem;* but the party being in England, I could enforce it by process of contempt *in personam* and sequestration, *which is the proper jurisdiction of this court.* And, indeed, in the present case, if *the parties want more to be done, they must resort to another jurisdiction.*"

These last italics are those of the original opinion as published, and show conclusively that the realty could not be bound by or even operated on by the decree of a foreign court; but if the plaintiff in the New York suit wanted the court there to do more than com-

pel Blackman, by process of contempt, to make Dull a deed, he "must resort to another jurisdiction," *i. e.*, Iowa; and that the New York court could not settle the title to the land in Iowa or vest that title in Dull, but could only compel Blackman to make a deed for whatever it might prove to be worth.

And such, too, is the express holding in *Gilliland vs. McQuarry*, 89 Ky., 434, cited by appellant and a line of which I quote: "It is true the title to the land is to be affected by the decree *in so far as it compels the party to convey.*"

That is, the title to the land is affected only in the limited or secondary sense of possibly compelling some party to do something *which when done* will affect the land. This is the sole doctrine of this class of cases, and the entire extent of such doctrine, and explains what is meant in this last cited case, that without regard to the location of the land, service on the party where found "*gives the right of action in personam, and the action is in personam for the purpose of enforcing a personal obligation* of contract or trust." This last view of the case has been cited and approved by the Supreme Court of Iowa in *Gilliland vs. Inabit*, 60 N.W. Rep., 211.

If the New York court had any actual jurisdiction over Blackman, that jurisdiction did not extend to the land; but it could "enforce a personal obligation" of his, if any there was, to convey to Dull, but could go no further.

"It is clearly not a judgment *in rem establishing a title in the land*, but operates *in personam only.*" *Hart vs. Sampson*, 110 U. S. on page 155. And in this same case the equity powers of a court are well defined:

"But in such a case, as in the ordinary exercises of its jurisdiction, a court of equity acts *in personam*, by compelling a deed to be executed or cancelled by or

in behalf of a party. *It* has no inherent power, *by the mere force of its decree, to annul a deed, or to establish a title.*"

"A decree cannot operate beyond the state in which the jurisdiction is exercised. It is not in the power of one state to prescribe the mode by which real property shall be conveyed in another."

Watts vs. Waddle, 6 Pet. 391 (400); *Story on Com. Laws*, 7 Ed. § 543.

Then for a judgment to be admissible against third parties, as was offered to be done in this case, it must have been one which did "annul a deed" or *did* "establish a title" and do it of itself. In *McGregor vs. McGregor*, 9 Ia., 65, Judge Wright's opinion, conclusively disposes of the effect claimed for this New York decree when he says (p. 78):

"When the case involves a naked question of title, the courts of a state, other than that where the land is situated, cannot sustain their jurisdiction." And that these courts "having authority to act upon the person may make decrees *not binding on the land itself*, but on the *conscience* of the party in regard to the land."

This is a decision of the highest court of a great state concerning lands within its own territorial limits, is a practical construction of its own statutes as to where suit, to recover lands within its own limits, must be brought, and we think *this* court accepts such construction by a state court of its own lands.

And exactly to the same effect is *Burnley vs. Stevenson*, 24 Ohio St., 474, in the second syllabus and the portion of the opinion referring thereto; while *Carpenter vs. Strange*, 141 U. S., 87, (opinion by Mr. Chief Justice Fuller) seems to us to have settled that the decree of a court of the state of New York, as to the title to lands lying in another state, was a nullity, even where the record title holder and actual owner of such lands, was a resident of New York, was served with the summons in that state and appeared to and defended the suit.

That a state has absolute control over the lands within its borders; and that the title thereto cannot be divested or in any manner be affected by the judgment of any courts but those of such state, and then only when held within such limits or counties as the laws of such state may prescribe, seems indisputable. The provisions of Sec. 1, Art. IV. of the Con. of the U. S. was never intended to allow the courts of one state to settle the *title* to lands in another state; and the claim of such an effect for such a decree, was not, I believe, ever fully asserted until done in this case;—especially where neither the owner of the land—the title holder—nor the land itself was within the jurisdiction of the court, for whose decree such effect is claimed.

A bill for the partition of lands cannot be brought outside of the local jurisdiction of such lands. *Glen vs. Gibson*, 9 Barb., 634; *Ry. Co. vs. Hammond*, 58 Ga., 523.

And in *Roberdeau vs. Rous*, 1 Atk., 543, Lord Hardwicke, who had gone to the lengths he did in *Penn vs. Lord Baltimore*, refused to entertain a bill for the recovery of an interest in real estate in St. Christopher's, saying that "Lands in the plantations were no more under the jurisdiction of this court, than lands in Scotland."

The question in all such cases as this is plainly, then. Are the *lands* to be affected within the jurisdiction of the court which is asked to say and decide who has the title thereto. The statute of Iowa (just quoted) says such court must be held in the very county in which the land lies. In *Pike vs. Hoare*, 2, Eden, 182, the lord Chancellor refused to direct an issue to be made up to try the validity of a will of lands in the colony of Pennsylvania, saying of the laws of the colonies—"they are local." And in the *Penn* case Lord Hardwicke disclaimed any original jurisdiction of

the question of the boundaries between Maryland and Pennsylvania; but said that having the litigants in his power he would make them do what he could not do himself, *put* the boundaries where *he* thought they should be. And if they had not deeded and released as ordered, he could have punished them, but the boundaries would have remained just where his court found them. After all, then, it was the act of the parties, however brought about, and not the decree of his court that settled the disputed line.

This discussion might be much extended and cases cited almost without number to the same point, but we think all must agree that the New York decree was and is without any effect in this case, as even if the court had jurisdiction over Blackman, its decree only required of him to do what he never did, and what the court never, so far as any one knows, attempted to force him to do—*i. e.* some personal act which when done was to affect the title to the lands; but which would not have had any influence on the case or effect on the land, as he had previously conveyed the same to third parties.

4. *Except in cases of "fraud, trust or contract," a court, foreign to the location of the real estate, has no jurisdiction to render a decree in personam, even if all the parties to the title were before said court.*

But the grounds on which *Massie vs. Watts* says that jurisdiction, even in proceedings looking to a decree *in personam*, can be maintained in cases where the land lies without the jurisdiction of the court, will bear analysis in order to determine if that case (a typical one of its class) was at all like the case at bar; or if the grounds of jurisdiction, as they appeared and were illustrated in that case, and in that class of cases, were ever present in the New York case; and to see if

any argument can be drawn from what is there said to be the source of equitable jurisdiction in that case, which has an application to this. That case says:

"In a case of *fraud, trust or contract* * * * the jurisdiction * * * is sustainable wherever the person is found * * * although the land is without the jurisdiction," etc.

Now, taking these grounds in their inverse order, was there any "contract" between Dull and Blackman for the reconveyance of the Iowa land, or any contract, that upon the failure of the title to the New York tract in Dull, the Iowa land should revert to him? There is nothing of the kind. No such contract is anywhere pleaded, or is there any evidence thereof. It is therefore evident that the court had no jurisdiction on the grounds of any contract between Blackman and Dull with reference to this Iowa land—even leaving out of sight the rights of the other parties to this suit.

Next was there any "trust" created between these two men, either express or implied, by the deal of June 28, 1889, by which the Iowa land was to be held for the use and benefit of Dull? There is not even a suggestion of such a thing either in pleading or proof.

Then was it "a case of fraud?" If so, fraud *in what; when*, and with reference to what particular transaction? As we have seen there is not a decent shadow or pretense that the deal of June 28, 1889, was tainted with fraud. It was a plain deal by which Dull acquired the means of harrassing his landlord—the only thing he asked or pretended to bargain for. He got the mortgage he asked, and was conceded the deed which he demanded and had placed *in escrow*. He took—actually took—all he was to have as the consideration for the Iowa lands. His and Blackman's contract—a contract *then fully executed*, was simple, plain and fully understood by both of them and then, being executed, was it not final and conclusive on both, so

far as anything in the *future* was concerned? There was no condition in that June, 1889, contract, either precedent to prevent its going into effect till complied with, or subsequent, the happening of which was to void the title to this Iowa land. Nothing of the kind! How then could the New York court get jurisdiction to cancel the deed or to compel a reconveyance?

Now the fraud alluded to in *Massie vs. Watts* had at the least to be inherent in the very deal by which the title to the land was obtained, and not in some future transaction by which the consideration for the land was lost. If the contrary were the rule then a man who pays cash for a tract of land and receives his deed therefor, may at some future time, by stealing that identical purchase money from the vendor, or by some other act defrauding him out of it—be divested of the title to the land which he had taken by an untainted transaction. No, the "fraud" in the case cited plainly means that fraud by which the title was prevented from vesting in him who furnished the consideration, and was the fraud of and in a particular action. It belonged to the time and place and subject matter then under consideration, and not to some remote or future act by which either might sustain some loss. The only fraud really alleged or with reference to which evidence has been given, was one some months after, and if perpetrated, *was in conveying the New York land to Lyon instead of to Dull.* And if the New York court was to take jurisdiction on account of fraud, it should have been of that fraud, and of its date and its subject matter.

Failure to deliver consideration never invalidated a deed. Said the Supreme Court of Iowa:

"The failure to deliver property agreed upon as the consideration of a conveyance, does not invalidate the deed, but merely furnishes the grantor a right of action for the value of the consideration stipulated."

Lake vs. Gray, 35 Ia., 459.

5. *The New York decree was void even as to Blackman, as he had long prior to the suit parted with all his interest in the land in controversy.*

Still further on the subject of this decree—it is void—so much waste paper even as to Blackman, for the reason that if service really was had on him in New York, he had not at the time the New York suit was brought and never since has had the title to the land which was the subject matter of that suit. Now supposing the rule as to the enforcement of a trust (where one really exists) justifies a court of equity in assuming jurisdiction to enforce the same whenever it finds in its jurisdiction, the one in whom the trust was placed, can such rule be invoked as against one who has parted with the title, and thus gain one step in what is in fact an action to quiet title? Can such a plaintiff, in another action against those who acquired the title, say I have broken your chain of title, I have destroyed your reliance on the deed by which your grantor held, and now it is necessary for you to show to my satisfaction your good faith; the consideration paid and everything necessary to establish affirmatively your title, or I take the land by virtue of my decree(?) in a court which could not pretend to jurisdiction over the land, or over the third parties who are to be thus affected by such decree? A mere statement of such a proposition demonstrates its unsoundness. It is seeking to divest the title of third parties to land by the proceeding of a court which had no jurisdiction either of the land or the parties in whom was the title. We do not believe that if that court had served Wright, Phelan, *et al.* in Westchester County, it could have rendered a decree binding them; for such a suit against them no more sound d in "fraud, trust or con-

tract" than did the transaction by which the title to the Iowa land vested in Blackman.

The suit was at best, purely one to quiet title to land and by one out of possession at that, and it has never before been pretended that equity had or could have any jurisdiction in such cases, either over the persons or subject matter, unless the court is held within the jurisdiction where the land is situated. Being purely such a suit, the New York court had no jurisdiction to affect even Blackman in whom the title *had been*, or those claiming, through any under him, by conveyances prior to the time the pretended suit was instituted against him. Such a suit is local in its nature, and the court, besides being required to have original jurisdiction over the subject matter, *as such*, must in that very action have jurisdiction over those in whom the title and other interests are vested, before it can pass judgment on the *act* of a party, from whom the present holders of the land derive their title, by which act said party derived the title he has since transferred. Such adjudication is not. and cannot in its nature be *personal*. It is an adjudication upon a link in the chain of title—sought and intended to affect the *title*—and the jurisdiction so to adjudge is purely local.

We say again that an examination of the pleadings and decree in this pretended New York suit, shows that it was not in fact or in essence a suit to enforce a trust, but was one to quiet the title to land in another state. Being what it was in fact, the court had no jurisdiction of the subject matter; and its decree even as to Blackman was void. In the state of Iowa, where the court had local jurisdiction of the subject matter—the land—the title to which was sought to be quieted—it was held that no valid decree could be pronounced, in the absence of jurisdiction over the party in whom

was the *legal* title. *Swan vs. Clarke*, 36 Ia., 560. How much more then is that true of a case where the court had no jurisdiction either of the land (the title to which was sought to be quieted in said suit) or of the party in whom was that title? The New York decree was therefore a nullity as to *all* parties.

The principles here contended for are also discussed and applied in *Miller vs. Mahaffy*, 45 Ia., 289, where as in *Swan vs. Clarke, sup.* it was held that *no decree* to affect any one, should be rendered until all parties were before the court. And in *McBride vs. Horn*, 48 Ia., 151, the case at bar, so far as this point it concerned, was before the supreme court of that state, and it was there held that the subsequent decree of the court of another state to which the holder of an interest was not made a party, could not affect his interest in Iowa land. Of these two cases we ask a careful perusal, as the text will show them stronger for us than the claim just made. In conclusion we call attention to a point which requires no argument which is—that whatever may be claimed for the New York decree *as against Blackman*, it is the sheerest nullity as against all the other defendants, who (together with the subject matter of the suit) were in other states, and who were never pretended to be served in the state of New York with any notice of such suit, and never appeared thereto.

The supreme court of Iowa found *as a fact*, on an issue directly presented, that there was no decree of a New York court, either (1) as to the land which was the subject matter of the suit, or (2) as to title holder *Phelan* or the incumbrancer, and therefore nothing for it to construe in the case at bar.

6. *The case should not receive consideration by this court, for failure of plaintiffs in error to ask a rehearing*

in the Supreme Court of Iowa, as allowed by the law of that state.

Sections 3201 and 3202 of the Code of Iowa in force at the time this cause was heard in the Supreme Court of that state; and rules 88 to 93 of that court distinctly provide for a rehearing of any cause decided by said court. The record in this cause fails to show that any such application was made to that court. Said sections, as amended, are as follows:

"SEC. 3201. If a petition for rehearing be filed the same shall suspend the decision, if the court on its presentation, or one of the judges if in vacation, shall so order, in either of which case such decision shall be suspended until after the final arguments provided for in the next section.

"SEC. 3202. The party filing a petition for rehearing may make the same an argument or a brief of authorities upon which he relies for a rehearing, and if he desires to make an oral argument in support of his petition, and as upon rehearing, he shall make an indorsement upon his argument, or brief, either in writing or print, stating in substance that the petitioner for a rehearing will ask to be heard orally in support thereof, which notice shall be served with the petition for rehearing upon the adverse party, and deposited with the clerk of the supreme court; and in such case such petitioner and the counsel for the adverse party shall have the right to be heard orally thereon at the next term of said court, or any subsequent term to which the same is continued. In such case it shall be the duty of the clerk to place the cause wherein the petition is filed upon the docket for the next term of the court beginning not less than twenty days after the depositing of the petition, indorsed as aforesaid, in his office."

And said rules of court are as follows:

"SEC. 88. No petition for rehearing shall be filed after sixty days from the filing of the opinion of this court.

"SEC. 89. Written notice of intention to petition for rehearing shall be served on the opposite party and clerk of the supreme court within thirty days after the

filing of the opinion, and if no such notice is served, the petition for rehearing shall not be filed after expiration of such thirty days.

"SEC. 90. The petition for rehearing, if there be no oral argument, shall be the argument of the applicant therefor, and if the court think that such argument requires a reply, it shall so indicate to the other party, and he may make reply within such time as said court shall allow. If the petitioner desire to make an oral argument in support of his petition, he shall indorse in writing or print a notice upon his argument or brief, stating that he will ask to be heard orally, which shall be served on the opposite party and deposited with the clerk. The cause shall then be placed upon the docket for the next term, being not less than twenty days after the filing of the petition, and the petitioner shall have the right to be heard orally at the next term, or at any term to which the case may be continued.

"SEC. 91. All petitions for rehearing shall be printed as required by section 96 hereof, and a copy shall be delivered to the attorney of the adverse party, and, if there be more than one, to the attorney of each, and nine copies to the clerk of this court.

"SEC. 92. The opinions announcing the decisions of this court in cases wherein petitions for rehearing are filed, shall be printed by the petitioners, and copies thereof shall accompany the printed copies of the petitions for rehearing filed with the clerk, or served on the opposite party. [Oct. 2, 1879, Ordered, that rule 92 be suspended in its operation in all cases wherein the opinions of the court are published in the *Northwestern Reporter*, before the petitions for rehearing are filed. Counsel in such cases being required to refer to the number and page of the *Reporter* in which the opinions are printed.]

"SEC. 93. If a petition for a rehearing be filed, the same shall suspend the decision or procedendo, if the court, on its presentation, or one of the judges, if in vacation, shall so order, in either of which cases such decision and precedendo shall be suspended until after final arguments."

It seems to the writer that the aforesaid statutes and rules gave to plaintiffs in error an opportunity of which they should have availed themselves in order to

have a hearing in this court, even in a proper case; and that the record here should show *affirmatively* that such opportunity was improved by them. When such privilege is given to a party and is neglected, he has not used every means afforded him to have a correct determination of his cause by the state court. In other words, where a rehearing in the court of last resort is allowed, and is not taken advantage of, a party has not had the *final* judgment of such court in the true sense of the term. Of course where a petition for a rehearing raised for the *first time* questions which were Federal or otherwise, the petition for rehearing could not be a part of the "record" in the proper sense, on which to prosecute error here. But for the purpose of getting the *final* judgment of the highest court of a state before coming to this court, the opportunity for a rehearing should, I think, be availed of, and such fact be of record here.

* * * * * * * * * *

Within the last few days and since the foregoing was written, I am in receipt of a notification from counsel for plaintiffs in error that their brief on the motion to dismiss or affirm, will constitute their argument on the whole case. An examination of that brief and of its alleged statements of facts, shows that such statements are wholly erroneous and misleading, and by no means state the case now at the bar of this court. If this court relies on such statements the court will be entirely misled. The statement made by the defendants in error, in their brief on the motion to dismiss or affirm, and that made by the Supreme Court of Iowa, as part of its opinion, alone states the case truly and with exact fairness. Then, too, such statements as are found on page 26 of the brief of plaintiffs in error, to-wit: that it is "solemnly admitted by Phelan and Duffie *that they acquired their interests without any considera-*

tion and with full notice of this fraud", are too outrageous to be met with the gentle language of indignant denial; and beside being wholly unfounded, are a reflection on the common sense of the high court from which this cause comes to this court. But such statements are no farther from the facts than each and every other allegation as to the facts, made by plaintiffs in error.

One other matter in their argument deserves attention, to-wit: that Blackman and others attempted to transfer the litigation from the New York courts to the courts of Iowa. The very contrary is the case. Dull attempted that. The suit in Iowa was commenced in February, 1892. In September, Blackman sold and transferred *all* his interest in the land to Phelan, and on the 17th of that month Phelan intervened in the suit, *as the sole party in interest as plaintiff and made Dull a party defendant.*[3] In November following, Dull having (as far back as September 22), conveyed *all* his alleged interest in the land *to his wife*, commenced his New York suit. The suit in Iowa, the true forum, was still pending and continued on to a decree, which was in 1894. That Dull brought his pretended New York suit, on the information of his Iowa attorney, and for the express purpose of evading the Iowa jurisdiction, no one can doubt who has read the *quasi* record which said attorney has had certified to this court. No better commentary on the claims of *fraud* alleged by that counsel, can be made.

The continual cry of fraud which is found on every page—and nearly every line of their printed argument, was disposed of by the decision of the highest court of the state, and upon such questions of fact this court does not, as we understand it, sit as a court of appeals; and will not give any attention to arguments thereon. The main questions here are (1) did the courts of New York have jurisdiction over both the subject matter

of the Dull-Blackman suit, *i. e.*, *the land in Iowa*; and (2) did such court have jurisdiction of the fee owner, Phelan, and the incumbrancer, Duffie; and (3) did such court render a decree which had the same force and effect as a decree of the courts of Iowa would have had, over land in that state, and in a suit in which the owner and mortgagee were actually before said Iowa court. That the New York court did not even attempt to render such a decree as an Iowa court could render, is plain from the record.

On the whole we think, and urge to this court, that the "decree" of the New York court was null and void as to the realty itself, for want of jurisdiction over said realty; was null and void as to Phelan the owner and holder of the title, and as to Duffie, the mortgagee, for want of jurisdiction over either of them; was unavailing to Dull and ineffective against Blackman, because prior to the institution of the New York suit the plaintiff therein, as well as the only defendant before that court, had parted with *all* their respective interests in the Iowa lands; and that the Iowa court, which in the suit brought up to the bar of this court, had unquestionable jurisdiction, both of the land and of all the parties having any interest therein, has rendered a decree as to said land and as to the real parties in interest therein, which your honors will not further inquire into.

Respectfully submitted,

Wm. J. Brown.

Counsel for Edward Phelan, Edward R. Duffie and George F. Wright.

OMAHA, January, 1898.